86-1117 (A)

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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RAYMOND BARTMAN, et al.,

Petitioners,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION, UNITED AUTOMOBILE AERSOPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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# BRIEF FOR RESPONDENT IN OPPOSITION

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January 28, 1987

29 pp

## QUESTION PRESENTED FOR REVIEW

1. Whether the District Court correctly dismissed Petitioners' ADEA claims because there was no issue of material fact as to whether or not the Plaintiffs' retirements from employment were voluntary?

2. Whether the District Court correctly dismissed Petitioners' ADEA claims against the unions because there were no genuine issues of material fact that the unions had not discriminated on the basis of age?

## A LIST OF ALL PARTIES TO THE PROCEEDING BELOW:

The caption of the case in this Court contains the names of all parties except for those additional names listed in footnote 1 at pages ii and iii of Petitioners Petition for Writ of Certiorari; and, in addition, that Local 248, United

Automobile, Aerospace and Agricultural Implement Workers of America has also been Defendant-Appellee.

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## STATEMENT OF THE CASE

Petitioners' Statement of Facts contains numerous conclusory, unsupported

contentions and material omissions. This Respondent, United Automobile, Aerospace and Agricultural Implement Workers of America, and Local 248, (hereinafter "UAW" or "union") offers the following corrections:

1. During contract negotiations between Allis Chalmers (hereinafter "A-C") and the UAW in 1981 and 1982, A-C suffered from substantial business decline. A-C sustained a loss in 1981 and predicted further losses in 1982. (Equitz Aff., ¶9). On August 17, 1982, the company announced the elimination of certain diesel engine production lines and the removal of other work from the West Allis Plant at issue here, to another location, causing the loss of 350 jobs. On August 21, 1982, A-C made public its plans to lay off 650 additional workers in West Allis by the end of the year. The union believed that A-C planned to move all of its operations out of West

Allis altogether. (Petitioners App. p. 13; Roznik Aff. ¶5; Collins Aff. ¶45). The UAW authorized early 1982 contract negotiations to replace the contract set to expire November 1, 1982. (Roznik Aff. ¶3).

2. A-C never singled out or emphasized cost cuts in the retirement benefit area. The February 3, 1982 communication sent to employees stated in pertinent part as follows:

> "If there is some confusion on just how labor costs could be reduced, it should be explained that it has never been the company's intention that these reductions would come only from employees take home pay. We would prefer that cost reductions be made in the area of benefits as well, which are a very real expense to the company, but which employees do not see on their paychecks."
> Petitioners App. p. 60

The union perceived A-C as propagandizing for labor lost costs generally; nowhere was there any specific aim to cut retirement

benefits, (see Roznik Aff. ¶¶2 and 5; Collins Aff. ¶16, ¶21), in contrast to A-C's having in fact targeted the foundry for closure if general labor costs were not achieved. (Collins Aff. ¶20; Petitioners App., pp. 58-60).

The union decided not to strike after the contracts' extension through November 15, 1982 expired. (Roznik Aff. ¶10; Equitz Aff. ¶12). A-C distributed a memo dated November 12, 1982 to all West Allis employees stating as follows:

> "In October, Allis Chalmers and United Auto Workers union representatives agreed to extend the current labor contract to November 15. Talks between the company and the union have continued since that time, but to date, have not produced agreements for represented production workers.
>
> The contract will expire at midnight Monday, November 15. Further negotiation meetings are expected and will be scheduled by mutual agreement.

Employees of operations in production are expected to report, as usual, on November 16, and thereafter are expected to report in accord with existing work schedules. Employees will continue to be paid in line with current compensation programs." Petitioners App. p. 56-57.

3. During this period, the company did not propose to reduce pension benefits. A-C did, however, continue to advance its proposal to change the health insurance plan to have a co-pay feature. (Equitz Aff. ¶13). The local union advised its membership of the company's proposal with respect to health insurance. The union further made it known to its membership that it was not amenable to changing the existing benefit program. The union further stated that the employer had not proposed any termination of the pension plan or decrease in monthly benefits although the local union could not predict if or when such proposals might be advanced by the

company in the future. (Roznik Aff. ¶9).

4. A-C and the union did know that retirement eligible employees were concerned about the hard choice of keeping their jobs and taking their chances on future retirement insurance benefits during contract lapse, or electing early retirement so as to vest their insurance and retirement benefits under the old plan. As a result, the union made several proposals to resolve this period of uncertainty for retirement eligible members. The union asked for an extension of the entire labor agreement past November 15, 1982. Alternatively, the union indicated that they would accept A-C's standing offer to keep pension and retirement insurance benefits unchanged in exchange for the union's withdrawing

earlier proposals for improvement in those benefits.[1]

Following this, the union requested that a written statement be issued by A-C stating that it had no intention to change pension or retirement benefits even after the contract lapsed. A-C indicated that it had not announced any changes but would not be foreclosed from the possibility of doing so in the future. The company's chief negotiator, Howard Equitz, cited several problems which A-C had with owners, creditors, and business associates and stated

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1. The union further agreed to allow further negotiations regarding the funding of the pension plan which the company had earlier proposed. The company refused these offers stating that it did not want "piecemeal" negotiations wrapping up retirement benefits without also concluding a full collective bargaining agreement. (Collins Aff. ¶53).

that he could not predict what the future would entail. (Collins Aff. ¶54).

5. Collective bargaining continued after expiration of the contract. During much of the negotiations and continuing through the contract lapse, an unfair labor practice complaint was pending before an Administrative Law Judge which alleged that A-C had engaged in bad faith bargaining regarding its demands for concession, the closure of the foundry, direct bargaining with employees, midterm repudiation of the labor agreement, refusal to supply bargaining information and anti-union amicus. (Collins Aff. ¶28). The union understood that dismissal of the pending Board complaint would be a condition at arriving at a settlement of the negotiations and obtaining a new contract. (Collins Aff. ¶¶72-73). The union raised the subject of petitioners' retirements, which petitioners had

come to claim as "forced," at bargaining sessions in December, 1982; however, A-C refused to give in on the issue. (Roznik Aff. ¶17). On January 24, 1983 a tentative agreement was reached conditioned on two events:

1. Ratification by the local unions and;

2. Dismissal of the complaint by the Administrative Law Judge. (Roznik Aff. ¶10).

By that time, the Administrative Law Judge had moved to amend the complaint to include an allegation that related the retirements to the unfair labor practice charge already pending against A-C; however, that motion to amend had not been acted upon by the time the Administrative Law Judge did, in fact, dismiss the complaint as part of the contract settlement. (Collins Aff. Exhibit 7) In the course of agreeing to dismiss

the Board charge pertaining to the West Allis unit, the union obtained A-C's agreement to resolve an additional outstanding NLRB charge pertaining to recognition of a UAW unit at Batavia, Illinois. (Shoemaker Aff. ¶9).

## SUMMARY OF ARGUMENT

Petitioners' Writ should be dismissed because no special or important reasons are present to grant the same. Petitioners failed to present a prima facie case of age discrimination against any Respondent. Summary judgment was properly granted by the District Court and affirmed by the Seventh Circuit.

## PETITIONERS FAILED TO DEMONSTRATE A PRIMA FACIE CASE.

The present case presents no question which would require the attention of the Supreme Court. Rather, it is a routine dismissal by summary judgment on the basis that there are no genuine issues of material

fact demonstrating that petitioners stated a prima facie case of age discrimination.

Petitioners must either present a case of direct evidence of discrimination, or satisfy the indirect test of McDonnell Douglas v. Green, 411 U.S. 792 (1973); see TWA, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613, 622 (1985). Despite Petitioners' conclusory and inflammatory claims to the contrary, there is no evidence of record from which any reasonable inference can be drawn relative to an essential element of their case under either method of proof; namely, that their removal from the labor force was the result of any action by the Defendants.

The Petitioners were not forced to retire by the terms of the written pension plan. Rather, Petitioners retired because they were fearful and uncertain as to what, if any, changes the employer would make with respect to pension benefits if they

worked without a labor contract in place. Both the District Court and the Seventh Circuit correctly found that Petitioners had failed to present a prima facie case because they could not show any adverse employment action on the part of the Respondents. Petitioners retired simply and solely because they could not be guaranteed the opportunity to retire with their old retirement package intact if they worked beyond the expiration of the contract.

Petitioners have framed the question presented for review in a manner calculated to cast a conclusory pale on the Respondents without facing the actual question of their failure of proof. Petitioners pose the question for review in terms of whether or not A-C "knowingly and deliberately misled" its employees into believing that it would exercise its right to modify or eliminate "substantial retirement benefits during a

period of post-collective bargaining agreement work" when A-C had no intentions to eliminate the benefits. (Petition, p. i). Petitioners further claim that the union "abandoned" their age discrimination claims. (Petition, p. ii). So stated, it appears Petitioners contend that there is proof of direct evidence to discriminate.

The only evidentiary basis for Petitioners' contention against A-C is the February 3, 1982 letter from A-C to its employees in which the company explained that it was seeking labor cost reductions in both areas of wages and benefits. Petitioners then point to the fact that A-C internally monitored the number of retirements which were occurring or could be projected. On the basis of these two bits of information, Petitioners jumped to the unreasonable conclusion that the company's actions in refusing to extend the contract

or issue a statement with respect to their post contract intentions, demonstrated a deliberate campaign to force them to retire. As to the union, there is no proof that the Petitioners concerns were "abandoned." Rather, the union attempted to forestall their retirement choices, and when this was not possible, still attempted to bargain about their status but without success.

As the Seventh Circuit indicated in their opinion, the Court must:

> "view the whole record, and must reverse if it is revealed that inferences concerning material facts contrary to those of the trial court may be drawn. Powers v. Dole, 782 F.2d 689, 694 (7th Cir., 1986). We are not, however, required to draw every conceivable inference, but only those that are reasonable. Matthews v. Allis Chalmers Corp., 769 F.2d 1215, 1218 (7th Cir., 1985); Parker v. Federal National Mortgage Association, 741 F.2d 976, 980 (7th Cir., 1984)." (Petitioners App. p. 2).

Here, based upon the record, viewed in the light most favorable to Petitioners, there is no reasonable inference that such deliberate action, policy or plan on the part of A-C "forced" the Petitioners to retire. Neither is there any reasonable inference that the Defendant unions abandoned the Petitioners' claims or intentionally traded them off to obtain some other benefits to younger employees or the union as an institution.

Petitioners also failed to show a prima facie case under the McDonnell Douglas test; specifically, Petitioners could not demonstrate an adverse employment decision by either Respondent. While this may vary with the circumstances of the claim (failure to hire or promote or discharge), certainly more is required that what Petitioners suggest at footnote 7, p. 23 of their Petition:

1. Membership in the protected class;

2. Adequate job performance;

3. Replacement by non-protected workers.

Where, as here, Petitioners signed up for their own retirement, they must show some proof of being forced to do so as in being constructively discharged. Utilizing the least stringent test described by any Court of Appeals, however, Petitioners fail to demonstrate constructive discharge. There are no facts which show that A-C did anything which made "their working conditions so intolerable" that they were forced to resign. Vaughn v. Pool Offshore Company, 683 F.2d 922, 926 (5th Cir., 1982), quoting Young v. Southwestern Savings & Loan Association, 509 F.2d 140, 144 (5th Cir., 1975) quoted by the Seventh Circuit herein at Petitioners Appendix, p. 6. The Seventh Circuit went on to observe:

> "In the instant case the condition that 'made' plaintiffs situation apparently intoler-

> able to them was not any action of A-C, but rather the expiration of the pension plan, an event brought about by the failure of the contract negotiations and the passage of time. Plaintiffs have not argued, nor could they on this record, that A-C delayed the contract process in order to induce their retirements by allowing the plan to expire." (Petitioners App. p. 6).

In the instant Petition, Petitioners have shown no facts beyond those correctly reviewed below. This matter is simply a review of a summary judgment dismissal in which Petitioners had failed to demonstrate an essential element of their case. See Celotex Corp. v. Catrett, ___ U.S. ___, 106 S.Ct. 2548 (1986) wherein the Court recently reiterated that Rule 56 of the Federal Rules of Civil Procedure requires the granting of summary judgment where a plaintiff fails to make a sufficient showing to establish every essential element of his or her case. The present matter presents none of the

considerations enumerated in Supreme Court Rule 17 for the granting of a Writ of Certiorari:

A. There Is No Conflict Of Decisions Among The Federal Courts of Appeal.

The underpinings of the Seventh Circuit's Decision in this case was that the Plaintiffs had "failed to present evidence that any action by A-C caused their departure." (Petitioners App. p. 6). There is no contention and indeed there cannot be that there is any split in the Circuits with respect to ADEA cases necessitating proof of an adverse employment decision by a defendant which the plaintiffs seek to hold liable. Nor has there been a federal question decided in a way in conflict with any state court, or in any manner which departs from the accepted or usual course of judicial proceedings. In their Writ, Petitioners simply reconstruct the

arguments, conclusory statements and claims formed and rejected in both the District Court and Court of Appeals below.

B. The Writ Presents No Important Question Of Federal Law Which Has Not Been, But Should Be Settled By The Supreme Court Or Which Had Been Decided Below In A Way In Conflict With Applicable Decisions Of This Court.

Petitioners have suggested that the Seventh Circuit's opinion conflicts with EEOC v. Bordens, Inc., 724 F.2d 1390 (9th Cir., 1984) and EEOC v. Westinghouse Electric, 725 F.2d 211 (3rd Cir., 1983). In both those cases, separate employment benefit packages had been negotiated to two groups: one eligible for retirement benefits, the other not. No such facts are present here. In this case, exactly the same treatment was rendered by both the employer and union to both retirement eligible and non-retirement eligible employees.

Both were given the opportunity to work after the contract expired. Both were told that if they did work they would be "paid in line with current compensation programs." (Petitioners App. p. 57). There were no employment opportunities afforded to any class, or denied to any class on the basis of age.

TWA, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613 (1985) is distinguishable for the same reason. In TWA, pilots were mandatorily retired unless they could achieve a position of flight engineer prior to their 60th birthday; however, pilots displaced for reasons other than age did not have to resort to the bidding procedure. In this case, no employment practice, policy or employment action was taken by A-C on the basis of either the Petitioners' ages or retirement eligible status. No bargaining decisions were made by the union on the basis of age or retirement benefit status.

Rather than present any conflict with TWA, Inc. v. Thurston, supra, the Seventh Circuit's opinion is squarely in line with interpreting the ADEA upon the same interpretive standards as Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §2000E, et seq. Specifically, with reference to the union's alleged discriminatory conduct, the Seventh Circuit "assumed (without deciding) that Plaintiffs could state an ADEA claim against the union based on failure to bargain with sufficient vigor citing Babrocky v. Jewel Food Co., 773 F.2d 857, 868 (7th Cir., 1985)." The Court stated, however, that "the record assembled below does not support Plaintiffs contention that the union simply abandoned them because it felt that the interests of younger workers were more important." (Petitioners App. p. 8). Indeed, the Court went on to state from the record as a whole the undisputed fact that

hundreds of other lower seniority workers had lost their jobs as a result of plant closures and subcontracting, and that all such job losses were the subject of the NLRB charges pending during the negotiations and dropped as part of the new Collective Bargaining Agreement. None were "bargained back." In analyzing the Plaintiffs' principal evidence of the union's intent to discriminate, (two statements allegedly made by the local President, Richard Roznik) the Court properly put such statements in context to analyze whether or not they would give rise to a reasonable inference of discriminatory intent. The context included the additional facts that after the alleged statements, the same local President did go on to try and bargain about the subject matter but was not successful. As the Seventh Circuit reviewed the record, it found that "the record reflects that the

union lost a lot of fights in the course of bargaining, and Plaintiffs' was one of them." (Petitioners App. p. 10).

**CONCLUSION**

The petitioners herein have pointed out no special or important reason why a Writ of Certiorari should be granted in this matter. The real issue is simply whether or not they have presented any proof of adverse employment action by way of constructive discharge, or any other direct evidence of discrimination. Both the District Court and the Court of Appeals have concluded that they have not. Based upon this, respondent respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

Miriam R. Horwitz,
Leonard S. Zubrensky
Attorney for Respondent Unions

## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 1987, three copies of the Brief for Respondent in Opposition were mailed, postpage prepaid, to:

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I further certify that all parties required to be served, have been served.

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